

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK KOZELEK, No C-05-4822 VRW  
Plaintiff, ORDER  
v  
JETSET RECORDS, a DBA designation  
for SHELLEY MAPLE, et al,  
Defendants.

On February 8, 2005, plaintiff Mark Kozelek filed suit in San Francisco county superior court against Jetset Records ("Jetset"), Ryko Distribution ("Ryko") and various Doe defendants seeking declaratory relief, injunctive relief and "[c]ompensatory damages in an amount in excess of \$25,000, plus interest thereon, together with punitive damages" arising out of defendants' alleged breach of a music recording and sales contract. Doc #1-2 (Not of Rem), Ex A, ¶¶ 1, 5-8 and at 7. After filing an amended complaint on August 4, 2005, that sought essentially the same monetary relief, plaintiff filed a statement of damages on October 28, 2005, claiming and reserving the right to seek \$175,000 in damages and \$50,000 in attorneys' fees and costs. Not of Rem, Ex C (FAC) at 10; id, Ex H.

1 On November 4, 2005, plaintiff filed a stipulation signed  
2 by all parties that required Ryko to deposit \$21,128.03 with the  
3 San Francisco county clerk and compelled plaintiff to dismiss Ryko  
4 with prejudice within two business days of payment. Not of Rem, Ex  
5 I, § 6. The state court adopted the stipulation on November 18,  
6 2005, and four days later, Ryko informed Jetset that it would  
7 deposit the money by November 28, 2005. Not of Rem, ¶ 10.

8 Jetset (which asserts it is a DBA designation for Easy  
9 Prey, LLC) and Shelley Maple (collectively, the "removing  
10 defendants") filed a notice of removal on November 23, 2005. Id.  
11 Ryko did not join in the removal and was later dismissed by the  
12 court after Ryko deposited payment on November 28, 2005. Doc #11  
13 at 2. On December 7, 2005, plaintiff timely moved to remand and  
14 argued, *inter alia*, that this case should be remanded because  
15 defendant Ryko "was a party to this action at the time of removal,  
16 but did not join in the removal." Doc #4 at 3 n1.

17 "[F]ederal courts are courts of limited jurisdiction,"  
18 Lanza v Ashcroft, 389 F3d 917, 930 (9th Cir 2004), and they must  
19 "strictly construe the removal statute against removal  
20 jurisdiction," Gaus v Miles, Inc, 980 F2d 564, 566 (9th Cir 1992).  
21 "Federal jurisdiction must be rejected if there is any doubt as to  
22 the right of removal in the first instance." Id. And "[t]he  
23 'strong presumption' against removal jurisdiction means that the  
24 defendant always has the burden of establishing that removal is  
25 proper." Id. Moreover, "[a]s a general rule, all defendants who  
26 may properly join in the removal petition must join." Ely Valley  
27 Mines, Inc v Hartford Accident & Indemnity Co, 644 F2d 1310, 1314  
28 (9th Cir 1981). See also 28 USC § 1446(a).

1           Because Ryko was still a defendant when this case was  
2 removed, its non-joinder caused the removal here to be procedurally  
3 defective. Nonetheless, the removing defendants contend that  
4 Ryko's joinder was not necessary because Ryko was soon to be  
5 dismissed from the case pursuant to the stipulation. Defendants  
6 read Prize Frize, Inc v Matrix (US) Inc, 167 F3d 1261, 1266 (9th  
7 Cir 1999), to hold that a subset of defendants can remove without a  
8 co-defendant's consent if the removing defendants can explain the  
9 co-defendant's absence. Doc #22 at 12. But Prize Frize only  
10 states that "the removing party has the burden under section  
11 1446(a) to explain affirmatively the absence of any co-defendants  
12 in the notice for removal," Prize Frize, 167 F3d at 1266; the case  
13 does not suggest that the court must accept any explanation as  
14 sufficient. Rather, the Ninth Circuit has delineated specific  
15 exceptions to the unanimous joinder rule, none of which is alleged  
16 to apply here. See Emrich v Touche Ross & Co, 846 F2d 1190, 1193  
17 (9th Cir 1988) ("Ordinarily, under 28 USC § 1446(a), all defendants  
18 in a state action must join in the petition for removal, except for  
19 nominal, unknown or fraudulently joined parties."). Moreover, even  
20 if Ryko's subsequent dismissal could correct the defective removal,  
21 the cure would be untimely because Ryko was dismissed more than 30  
22 days after the removing defendants allege that this case became  
23 removable. See Prize Frize, 167 F3d at 1266 (cure must be within  
24 30-day statutory period under the removal statute, 28 USC §  
25 1446(b)); Doc #22 at 1 (removing defendants contend that service of  
26 plaintiff's statement of damages on October 28, 2005, triggered  
27 start of 30-day clock).

28 //

1           The court notes that some district courts have found that  
 2 a settlement agreement, such as the stipulation between plaintiff  
 3 and Ryko, excused a defendant from joining in a notice of removal  
 4 even before that defendant was formally dismissed. See Erdey v  
 5 American Honda Co, 96 FRD 593, 599 (MD La 1983) ("Where plaintiff,  
 6 by his voluntary act has definitely indicated his intention to  
 7 discontinue the action as to the non-diverse defendant \* \* \* the  
 8 case then becomes removable under 28 USC § 1446(b). The  
 9 technicality of how plaintiff's intention is expressed is of no  
 10 moment \* \* \*." (citation omitted)); Leshner v Andreozzi, 647 F Supp  
 11 920, 921-22 (MD Pa 1986) (same); Hessler v Armstrong World  
 12 Industries, Inc, 684 F Supp 393, 395 (D Del 1988) ("[I]n cases  
 13 involving settlement with non-diverse defendants, formal dismissal  
 14 is not a prerequisite for removability."); DiNatale v Subaru of  
 15 America, 624 F Supp 340, 342-44 (ED Mich 1985) (same); Adams v  
 16 Estate of Keck, 210 F Supp 2d 863, 865 (WD Ky 2002) (settlement  
 17 extinguished claim against non-diverse defendant and permitted  
 18 removal even though damages under the settlement agreement were  
 19 still in dispute); Heniford v American Motors Sales Corp, 471 F  
 20 Supp 328, 338 (D SC 1979) (Even without formal dismissal,  
 21 plaintiffs' counsel's admonishment to the jury not to return a  
 22 verdict against the non-diverse defendant enabled removal).

23           Nevertheless, these non-binding cases can be  
 24 distinguished because they turned upon whether complete diversity  
 25 was present at the time of removal. The defendants in those cases  
 26 were jurisdictionally barred from removing until the plaintiff  
 27 dismissed a non-diverse defendant, which a plaintiff who sought to  
 28 avoid removal might be loathe to do. E g, DiNatale, 624 F Supp at

1 344 (noting "that the sole purpose of the form of settlement with  
2 [the non-diverse defendant] was to defeat [the diverse defendant's]  
3 right to remove"). By contrast, the removing defendants here  
4 simply had to secure Ryko's approval to remove this case. Without  
5 any allegation that plaintiff acted in some way to prevent removal,  
6 this court sees no reason to depart from the general principle that  
7 "all defendants who may properly join in the removal petition must  
8 join." Ely Valley Mines, 644 F2d at 1314.

9 In sum, the court GRANTS plaintiff's motion to remand  
10 (Doc #4) and REMANDS the case to San Francisco county superior  
11 court. The court DENIES AS MOOT the removing defendants' motion to  
12 transfer. Doc #14. The clerk is DIRECTED to close the file and  
13 TERMINATE all motions.

14  
15 IT IS SO ORDERED.

16  
17 

18 VAUGHN R WALKER

19 United States District Chief Judge  
20  
21  
22  
23  
24  
25  
26  
27  
28